Supreme Court, U.S.
FILED
APR 18 2003
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No. 02-1173

In the Supreme Court of the United States

METROPOLITAN TRANSPORTATION AUTHORITY,

Petitioner,

v.

SEAN GREENE.

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF

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REPLY BRIEF

The presence of no fewer than four *amicus* briefs urging the Court to grant certiorari demonstrates that this case is of national concern. Those briefs underscore the reasons why the approach taken by the Second Circuit conflicts with governing constitutional and statutory standards and upsets settled expectations of the agencies that oversee public rail transportation. One brief expresses the concerns of the association representing all public transportation officials and agencies throughout the country. Three other *amicus* briefs come from individual transportation agencies located in three other circuits. As they explain, review is necessary to uphold their exclusion from FELA coverage and to restore and settle the sovereign immunity to which these agencies are entitled, if confronted with FELA claims by their own employees. SETPA's *amicus* brief (at 3) explains that the decision below already has sparked additional FELA litigation against it.

I. STATE TRANSPORTATION AGENCIES ARE ENTITLED TO SOVEREIGN IMMUNITY.

1. Respondent does not deny that New York treats the MTA as a State agency or that the Legislature declared that the MTA is "performing an essential governmental function in carrying out its purposes." N.Y. Pub. Auth. L. § 1264(2). Nor does he deny that the Legislature assumed that the MTA would share in the State's immunity, except to the limited and irrelevant extent that the Legislature gave its "consent" to certain claims against the MTA. § 1276.

Instead, respondent repeats the same arguments evidently accepted by the Second Circuit, insisting that the Second Circuit's "impact on the State treasury" test remains good law in determining whether a State agency is entitled to sovereign immunity. See *Feeney* v. *Port Auth. Trans-Hudson Corp.*, 873 F.2d 628 (2d Cir. 1989), aff'd on other grounds, 495 U.S. 299 (1990). See also *Fitchik* v. *New Jersey Transit Rail Operations, Inc.*, 873 F.2d 655 (3d Cir.

1989) (*en banc*) (applying "impact on State treasury" test).

This argument, however, frames the question that calls for review. There is no doubt that at one time the "impact on the State treasury" was viewed as a significant and perhaps controlling inquiry in evaluating an agency's claim to sovereign immunity. For example, in *Hess* v. *Port Authority Trans-Hudson Corporation*, 513 U.S. 30 (1994), the Court concluded that a bi-state agency (the Port Authority of New York and New Jersey) created by Compact was not entitled to Eleventh Amendment sovereign immunity from FELA suits. The Court concluded that Compact agencies are not agencies of "a State" within the meaning of the Eleventh Amendment and that immunity should not be extended because the Port Authority's debts were "not liabilities of the two founding States" and the States "lack financial responsibility" for those debts. *Id.* at 37, 45.

However, the four dissenters in *Hess* (Justice O'Connor, joined by the Chief Justice and Justices Scalia and Thomas), disagreed with the basic premise of the "impact on the State treasury" test. As the dissent stated:

> "The Court's assertion that the driving concern of the Eleventh Amendment is protection of state treasuries . . . is belied by the text of the Amendment itself. *** The Eleventh Amendment does not turn a blind eye simply because the state treasury is *not* directly implicated. *** We have always respected state flexibility in setting up and maintaining agencies charged with furthering state objectives." *Id.* at 60-61 (emphasis original).

Respondent and the Second Circuit now turn a "blind eye" to the Court's most recent sovereign immunity decision, *Federal Maritime Commission* v. *South Carolina State Ports Authority*, 535 U.S. 743 (2002), which prompted the MTA's claim of sovereign immunity. That decision last Term is the culmination of a crucial evolution in the Court's sovereign immunity jurisprudence. As our Petition explained, a

majority of the Court there upheld a State ports authority's claim to sovereign immunity, even though the litigation posed no threat at all to the State's treasury. The Court explained that the "primary function of sovereign immunity is not to protect State treasuries . . . but to afford the States the dignity and respect due sovereign entities." 535 U. S. at ___ (slip op. 24).

Under this standard, the MTA and other agencies created by State legislatures to perform the "essential government function" (N.Y. Pub. Auth. L. § 1264(2)) of coordinating regional transportation or directly providing that transportation are entitled to share in the State's immunity. Indeed, respondent also ignores the decisions leading up to the *South Carolina Ports* case, which had overruled the Court's earlier decision in *Parden* v. *Terminal Railway of Alabama State Docks Department*, 377 U.S. 184 (1964). *Parden* had declined to recognize the sovereign immunity of a State railroad agency faced with FELA claims. Its overruling means that these agencies now are entitled to immunity from FELA claims, even if they are deemed "railroads" under FELA.

2. The New York Legislature and New York courts correctly treat the MTA as "a State agency" for the purpose of constitutional immunity. Without contesting any of the authorities the MTA cited for this proposition, respondent asserts that the Governor only "selects" five members of the MTA's board of directors, while twelve are "selected" by other officials. This is not true. Various officials of the communities the MTA serves have the right to *propose* candidates for twelve of the seats, but the Governor decides whom to appoint to each of the seats:

> "The authority [MTA] shall consist of a chairman, sixteen other voting members, and two non-voting and four alternate non-voting members . . . *appointed by the governor by and with the advice and consent of the senate*."

N.Y. Pub. Auth. L. § 1263(1)(a) (emphasis added).

In addition, the Governor may remove *any* board member for "neglect of duty." § 1263(7).

Moreover, in addition to this gubernatorial control, the Legislature and various other State bodies are actively involved in supervising the MTA's activities. The MTA is obliged to consult with the State Division of the Budget and the Department of Transportation on various matters. § 1263(4)(b). The State Comptroller audits the MTA's books. § 1276-a. The MTA's capital programs must be reviewed by a separate Board appointed by the Governor, and that Board must approve any bonds the MTA proposes to issue. §§ 1269-b(1), (9) and 553(20). The State limits the amount of bonds the MTA can issue. § 1269(12). On the flip side, the State provides over a billion dollars a year to help fund the MTA's operations through the State's transportation assistance program, debt service on transportation bonds, and appropriation of "dedicated" portions of taxes on motor vehicles, fuel, and regional sales taxes. See, *e.g.*, § 1270-c; N.Y. Transp. L. § 18-b; N.Y. State Fin. L. § 88-a(7).

Thus, structurally, functionally, and financially, the MTA is an "arm of the State." As such, it is entitled to the State's immunity from FELA suits. As explained in the various *amicus* briefs, the Second Circuit's refusal to recognize this immunity concerns not only the MTA but dozens of other public transportation agencies around the country whose immunity has been thrown into doubt.

II. FELA Does Not Apply to Agencies or Corporations That Own and Oversee Operating Railroads But Are Not "Going Railroads."

1. In arguing that the Second Circuit applied a "rather long standing and time tested" standard for determining FELA coverage (Br. in Op. 1), respondent perpetuates the

flaw in the lower court's approach. Each of the cases on which respondent relies arose under a different statute with different definitions and objectives. As explained in the Petition (21-22 & n.5), those cases have nothing to do with determining whether Congress intended to subject a railroad's parent *to FELA claims* by its employees. Like the Second Circuit, respondent ignores the test this Court has fashioned for identifying the entities that are subject to FELA — the "going railroad" test established in *Wells Fargo & Company* v. *Taylor*, 254 U.S. 175, 187-88 (1920), and *Edwards* v. *Pacific Fruit Express Company*, 390 U.S. 538, 540-41 (1968).

Respondent brands as "ludicrous" (Br. in Op. 4) the MTA's statement that it is "not a railroad." He asserts that in November 2002 the MTA announced "a merger of the Long Island Railroad and Metro-North Commuter Railroad to form a new 'MTA Railroad'." *Ibid.* This assertion is both factually inaccurate and legally irrelevant. The MTA Chairman announced a *proposal* to merge the MTA's various operating subsidiaries (including its two railroads) into "five distinct companies under the MTA." MTA Press Release No. 31 (October 9, 2002). One of those new subsidiary companies would take the "two separate rail companies" that the MTA "oversees" and merge "the two railroad managements into a single structure" to "create a more efficient railroad, one with a broader regional focus." *Ibid.* Thus, even this proposal would retain the legal distinction between the MTA on the one hand and its "distinct" operating subsidiaries (railroads, bridges and tunnels, subways, and bus companies).

Moreover, reinforcing our point that the MTA itself is an arm of the State entitled to sovereign immunity, this proposed restructuring will require action by the New York Legislature. Both the MTA and many of its subsidiaries are creatures of the Legislature. No legislation has yet been introduced to achieve this realignment.

Most significantly, this proposed "merger" of the MTA's two operating railroad subsidiaries would no more make the parent of that combined railroad a "railroad" under FELA than does the MTA's current ownership of *two* separate railroad companies. Thus, even if the Legislature were to approve the proposed restructuring, the central issue would remain the same as when this case began: Under what circumstances is the legally distinct parent of a separately incorporated operating railroad subject to FELA?

2. In answering that question respondent relies on the Second Circuit's novel standard for FELA coverage, declaring that it was sufficient to show that the MTA is "integrally involved in the essential business aspects of the Long Island Railroad's operation." (Br. in Op. 3). However, as discussed in the next section of this Reply Brief dealing with the "veil piercing" issue, a parent's "involvement" in the "essential business aspects" of its railroad subsidiary does not obliterate the legal distinction between the two entities. It does not transform a State agency into a "railroad" simply because the agency oversees the "essential business aspects" of its railroad subsidiaries. Otherwise, the MTA's similar statutory responsibility for overseeing and coordinating the business affairs of its other subsidiaries would make the MTA a subway, a bridge or tunnel, or a bus company!

As Justice Brandeis observed in a related context, Congress uses the term "carriers" "as it is understood in common speech" to mean particular railroads "as distinguished from the corporations owning or operating them." *Missouri Pac. R.R. Co.* v. *Ault*, 256 U.S. 554, 559-60 (1921). The *amici* explain why it is so important for this Court to reaffirm that the correct test for FELA coverage is not whether a transportation agency or corporate parent supervises its railroad subsidiary but whether the parent itself may fairly be termed a "going railroad." As explained in the Petition (18-19), every other circuit has understood that FELA does not enter the picture *unless* the injured worker

was employed by a "going railroad." They use the inquiries framed by *Lone Star Steel Co.* v. *McGee*, 380 F.2d 640 (5th Cir. 1967), on which the Second Circuit mistakenly relied, only to determine whether the "going railroad" is a "common" carrier and is operating in "interstate" commerce.

III. THE PARENT OF AN OPERATING RAILROAD IS SUBJECT TO FELA ONLY IF THE COMMON-LAW STANDARDS FOR "PIERCING THE CORPORATE VEIL" ARE MET.

1. The third question presented by the Petition asks the Court to decide whether, as the MTA argued to both courts below, the common-law standard for "piercing the corporate veil" is the test the courts must use in evaluating any attempt to hold the separately incorporated parent of a railroad subject to liability under FELA. In the Petition (25), the MTA cited a string of cases in which this Court has insisted that, unless expressly displaced by statutory text, FELA incorporates common law doctrines and must be construed in light of common law principles. The Court extended that unbroken line of decisions in its intervening opinion in *Norfolk & Western Ry. Co.* v. *Ayers*, 538 U.S. __ (March 10, 2003). Although several Justices disagreed about how to apply the relevant common-law standards to the issue before the Court, all Members of the Court agreed that the nature and scope of the railroad's liability must be determined using common law doctrines. 538 U.S. at __ (slip op. 6).

In looking for the governing common law principles, the "state of affairs when the FELA was enacted" is the pertinent inquiry. 538 U.S. at __ (slip op. 27). When Congress enacted FELA in 1908, the common law of corporations had already settled the principle that the courts must respect the separate legal identities of the owners of a corporation and the corporation itself, including the distinction between a corporate parent and its separately incorporated subsidiary. A basic corollary of this principle was that any regulations or liabilities applicable to the subsidiary did not apply to the

corporate parent or controlling shareholders. See A. Berle & G. Means, THE MODERN CORPORATION AND PRIVATE PROPERTY 128-29 (1932).

By the early part of the twentieth century, the common-law courts had evolved a very narrow exception to this principle. As summarized by the seminal article that coined the term "piercing the corporate veil," the "concept of corporate entity should be ignored and the veil drawn aside" only when used to "defraud creditors", "evade an existing obligation", or otherwise make the corporate distinction a reflection of "knavery." I.M. Wormser, *Piercing the Veil of Corporate Entity*, 12 Colum. L. Rev. 496, 517 (1912). Thus, the exception allowed the courts to attribute a corporation's duties and liabilities to its parent or controlling shareholders if, but only if, the corporate form was essentially a sham.

When FELA was enacted, virtually all railroads were organized in the corporate form, including some that were subsidiaries of corporate holding companies. Congress's decision to impose FELA obligations only on what this Court has repeatedly termed the "going railroad" permits only one conclusion: FELA does not expose the *owners* of the "going railroad" to liability, unless a claimant can satisfy the prevailing standards for "piercing the corporate veil."

The MTA argued below that this must be the inquiry, but the Second Circuit fashioned a much more expansive test. It premised the MTA's exposure to FELA on the same kinds of traditional parent-subsidiary oversight that this Court in *United States* v. *Bestfoods*, 524 U.S. 51 (1998), held insufficient to satisfy common-law veil-piercing standards deemed incorporated in CERCLA. Earlier this Term the Court reached the same result under the fair housing statute. *Meyer* v. *Holley*, 537 U.S. __ (January 22, 2003). Under these standards, "the MTA's activities fall within the 'accepted norms of parental oversight of a subsidiary's facility,' which is more than sufficient to insulate the MTA

from liability under FELA." Comment, *The MTA, It's Not Going Your Way" — Liability of the Metropolitan Transportation Authority under FELA: Greene v. Long Island R.R.*, 75 St. John's L. Rev. 113, 130 (2001) (quoting *Bestfoods*, 524 U.S. at 72). The presence of several *amicus* briefs supporting the MTA's petition shows that it is extremely important to public transportation agencies and corporate parents of operating railroads to have the Court decide that common-law veil-piercing standards also must be used in FELA cases.

2. Nearly thirty years ago, the Court addressed an issue related to the question here. It considered when a worker *not* employed by a railroad may bring a FELA claim *against the railroad.* In *Kelley* v. *Southern Pacific Company*, 419 U.S. 318 (1974), the injured worker was employed by a trucking company that loaded freight onto rail cars under a contract with the railroad. He was injured when he fell off a rail car. He sued the railroad rather than the trucking company, claiming that he was injured "while employed" by the railroad. The district court had employed an expansive test for FELA coverage, concluding that the relationship between the railroad and the worker's employer made both the trucking company and its employees the railroad's "agents." This Court rejected that approach as inconsistent with FELA's limited coverage. The Court explained that, applying "common law principles," the "while employed" standard of FELA can only be satisfied by "proof of a master-servant relationship *between the plaintiff and the defendant railroad.*" *Id.* at 323-24 (emphasis added).

Under any of the relevant "common law" tests, the Court required that a FELA plaintiff must prove the basic element of a "master-servant" relationship with *the railroad*: that is, that the railroad "controlled or had the right to control the physical conduct" of the plaintiff when he performed work on the railroad's behalf. *Id.* at 325.

Since respondent Greene could not satisfy the *Southern Pacific* test, he has no viable claim against the only railroad conceivably involved here, the LIRR. Greene was not just "nominally" employed by the MTA, rather than the LIRR. His assignments and his dispatch to conduct an investigation were controlled by the MTA's Police Force, for which he worked, not by the LIRR.

The issue, then, is whether Greene nevertheless has a FELA claim against the LIRR's *parent*, his *non-railroad employer*. In allowing his claim, the courts below refused to recognize and apply the controlling common-law test — veil piercing. In deciding that claims like this may proceed against a railroad's parent, the lower courts disregarded FELA's focus on the actual employment relationship, ignoring the need to show that the plaintiff was injured "while employed by" *the railroad*. Instead of focusing on the degree of control exercised *by the operating railroad* over *the plaintiff*, as *Southern Pacific* requires, the courts relied on the degree of control *by the plaintiff's employer* over *the operating railroad*.

The Court should grant review to decide that employees of entities that furnish services to railroads (who cannot bring FELA claims against the railroads under *Southern Pacific*) cannot substitute their own employers as FELA defendants, unless they can satisfy common-law veil-piercing standards.

Respectfully submitted.

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APRIL 2003